United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7242

ORIGINAL

To be argued by Seymour Simon.

United States Court of Appeals

For the Second Circuit.

PETER ROSENBRUCH,
Plaintiff-Appellant,

against

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF OF PLAINTIFF-APPELLANT.

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Table of Contents.

AUTHORITIES.

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General Comments as to the Steamship Company's Theories of the Case.

Seeing through the steamship company's miasma of false issues, rhetoric and tenuous interpretations of amorphous rationales, the transcendental basic issue is manifest: what is the extent of the carrier's liability for the shipper's "goods" within the language and spirit of Sec. 4(5)?

The resolution of this question is simple when one notes that the relevant part of the statute by its clear terms regulates the extent of the carrier's *"liability"* to *the shipper for his "goods."* The statutory term "goods," by dictionary definition means "merchandise or property." The steamship company's container is not Rosenbruch's "goods". Further, since the carrier has no liability whatsoever to Rosenbruch for the loss of its own

equipment, the container is outside the scope of a statute fixing the *liability of the carrier*. Otherwise stated, Sec. 4(5) cannot apply to the container itself for two reasons: (1) It is neither Rosenbruch's "goods", (2) nor the carrier's liability.

It is not disputed that the 40′ x 8′ x 8′ nondisposable metal container is the steamship company's equipment which is an integral part of its containership operations and repeatedly used as a movable cargo hold in order to reduce its stevedoring costs. To hold that a carrier's sea container is a package is tantamount to holding that a steamship company's cargo sling, forklift truck, deep-tanks or any other equipment used to handle or transport cargo is a package within the purview of the Act, rather than the shipper's goods. The common understanding of the term "package" is goods or merchandise wrapped in expendable wrappers which are the property of the owner of the goods.

It is important to note that Sec. 4(5) does not require that the goods be packaged at all; in fact it also provides for unpacked goods. Similarly, the Act puts no restraints whatsoever upon the shipper altering the size or nature of his packaging, even if it may be done solely to prevent the carrier from avoiding liability on the basis of the package limitation. On the other hand, the Act clearly imposes restrictions on the steamship companies to insure that they do not avoid the object of Sec. 4(5).

By holding that the carrier's own equipment was Rosenbruch's "goods" for which it is liable to Rosenbruch, the terms and clear objective of the statute have been perverted by Judge Tyler—to say nothing of reason itself. His decision disregards the statutory terms and purpose, and instead, protects the negligent *steamship company* (which is already protected by its own adhesion con-

tracts, tariffs and cartel-like Conference) from Rosenbruch who is the injured innocent victim. The shippers (unlike the carriers) are not organized, and they have no choice but to fill out the forms and accept the terms of the bills of lading drafted in fine print by the steamship companies acting in concert through their "Conference" or cartel. It is difficult to understand why Judge Tyler favors the negligent organized carriers over their innocent victims by reducing the carrier's liability to a mere token amount to the extent of ignoring the real goods and treating the carrier's own equipment as "goods" for which it is *liable* to Rosenbruch. An obvious fiction!

By limiting the steamship company's liability for the loss of Rosenbruch's property valued at $102,917.08 to $500 on the ground that the carrier's equipment is Rosenbruch's "goods" for which it is "liable," and by ignoring the packages of goods inside, Judge Tyler flies in the face of reality, equity, the statutory terms and policy, and the sound applicable precedents of this court.

It is submitted that the forty years of a multitude of decisional law on the package issue handed down since COGSA was enacted in 1936 would best be preserved if the carrier's equipment were to be simply treated as such and the shipper's goods as such, as has been soundly done by this court in *Leathers Best* and *Shinko Boeki.*

After Rosenbruch's main brief was printed, an interesting regulatory decision was published in the advance sheets entitled *Japan Line Ltd. v. United States,* 393 F. Supp. 131 (1975). This case was considered by a Circuit Judge and two District Judges sitting as a statutory three-judge District Court. The decision (at p. 134) refers to a situation where packages shipped by several shippers are stowed in a single container by a freight forwarder. If this court holds that a container is a single

package under similar facts as the instant case, what would each shipper receive?

The steamship company has completely failed to answer Rosenbruch's Point IV to the effect that Judge Tyler's decision is internally inconsistent since it holds on the one hand that the carrier's equipment was the shipper's package of goods; and on the other, that the container was really a part of the ship itself, so that stowing it on the weather deck was not an unreasonable deviation, as it clearly would have been if it were a true package of goods not containerized.

In Reply to Statement, Facts, and Point I of the Steamship Company's Brief.

The specific matters contained in the steamship company's brief will be succinctly replied to herein.

Under the steamship company's "Statement" on page 4 and "Facts" on page 5, reference is made to wooden vans. There is nothing in the record about this.

On page 7 of its "Facts," the steamship company for the first time alleges that the vessel was equipped to carry containers on deck by using special deck fittings, lashings and strengthening the deck. There is nothing in the record about this, either. In any event, they do not protect the cargo as manifested by the events of the voyage itself.

Rosenbruch must object to the introduction of the brochure referred to on page 11 and attached to the steamship company's brief, inasmuch as it was not part of the record. However, it is interesting to note that the illustration on page 47 shows how a container is *"loaded"*

with machinery parts, and tiered, strapped and braced in the same manner as the hold of a ship!

On page 12 the steamship company discusses *Leathers Best.* It is important to note in that case the ocean bill of lading described the shipment as: one container STC (*said to contain*) 99 bales of leather. The significance of the term "SAID TO CONTAIN" is to specify that the steamship company did *not* verify the contents of the container!

On page 13 a quotation from *Leathers Best* allegedly limiting its applicability is given; however, the discussion by the steamship company is incorrect inasmuch as the antecedent of the first word "it" is not the decision of the court, as implied by the carrier, "it" merely refers to a distinction the court was making between an inapposite case, *Standard Electrica v. Hamburg Sudamerikanische.*

On page 16, the steamship company states that Judge Tyler followed the *Leathers Best* opinion. This misstatement is clearly refuted by Judge Tyler himself in his opinion. He revealingly (357 F. Sup. 985) cites the dissent of Judge Hays in *Encyclopedia Britannica* (a case dealing with deviation rather than the container/package issue) this way:

> "Judge Hays in his dissent in *Encyclopedia Britannica Inc. v. Hong Kong Producer,* 422 V. 2d 6 at 20 (2nd Cir. 1959), would achieve this by deeming a container, where those conditions are met, a Sec. 4(5) package. *I agree.*" (Italics added.)

Thus, it is clear that Judge Tyler while paying lip service in part to and disagreeing in part with *Leathers Best,* actually "agreed" with the dissent of Judge Hays in an inapposite case to conclude that *all containers* are pack-

ages when they contain the goods of one shipper and are not stowed by the carrier.

On pages 20-21 the steamship company argues that the *Royal Typewriter* test (which Mr. DeOrchis himself has criticized) should be applicable herein despite the fact it refers to a shipper's own atypical container for use on a conventional ship. Mr. Simon has already fully discussed his views regarding this specious and irrelevant test in two articles published in the Journal of Maritime Law and Commerce cited in the briefs. Suitability to obsolete modes of transport is not relevant to the issues. It is purely lawyers' rhetoric to try to show that something is not what it really is by raising irrelevant issues such as insurance, economics, functioning in other modes of transport, etc. etc. It is this type of obfuscation that produced the unsound *Royal Typewriter* "functional economics test." Whether a particular package could have been shipped in another mode of transport is irrelevant and sheer speculation. It is usual to ship goods without packages at all, such as automobiles, steel beams, ingots of metal, to name a few. A steamship company can carry *any type* of goods no matter how packaged or unpackaged, provided proper care is afforded them. There is virtually no such thing as an untransportable package.

On page 23 the steamship company's attorney lists three reasons why the KULMERLAND test which he criticized elsewhere defeats Rosenbruch's position. As to item No. 1, since the carrying vessel carried solely containers, the shipper *had* to use the carrier's container to ship his goods; therefore he had no choice—whatever that has to do with it. In item 2, the steamship company states that they had no knowledge of the contents of the container. This, of course, is pure "crocodile tears." The steamship company prepared its bill of lading form in such a man-

ner as to *prevent* the shipper from showing any particulars regarding the contents of containerized shipments. See the carrier's bill of lading form opposite 28a in which the second column from the left of the bill of lading calls for: "Number of containers *or* other packages." If the carrier were really interested in knowing what is inside the container it could provide a space for this information. Moreover, its own tariff permits it to inspect the contents of any container. See Exhibit A (49a) Tariff 13 L (a) in which the steamship company's tariffs specifically permits it to open and inspect the contents of any container.

At pages 5, 21 and 23 the steamship company's attorney again raises issues which are not contained in the record regarding the building of a forty foot van in the event that the steamship company's forty foot container was not used. In any event, the fallacy of this thinking is that Sec. 4(5) of COGSA does not preclude a shipper from altering its packages either by size or nature of packaging materials used in order to enable it to prevent the steamship company from avoiding liability by reason of package limitation. On the contrary, the act clearly indicates that Sec. 4(5) was aimed at the steamship company only, while giving the shipper the right to take advantage of all packaging modifications that it deemed fit in order to protect its own interests. Hence, it is incorrect to argue that a shipper may not take advantage of modern technology and modify the size or nature of his packages in order to prevent the steamship company from taking advantage of a $500 package limitation. Should the carrier be the only beneficiary of containerization?

On page 25 and on the top of page 26 the steamship company's attorney committed a serious oversight. He quoted from the *Shinko Boeki v. SS Pioneer Moon* opin-

ion in an effort to indicate approval of *Royal Typewriter* but omitted to indicate that the Court of Appeals was referring solely to *"note 6"* of the opinion. If the omitted note 6 were examined, it would refute the steamship company's argument. Note 6 (483 F 2nd 648) indicates that the State Department took the position that in view of the soundness and generality of the ruling contained in the *Leathers Best* case that a container is not a package, it may not be necessary to ratify the Brussel's protocol which was passed in 1968 in order to prevent inequitable court decisions (such as *Standard Electrica*) where packages are palletized or containerized.

On page 28 and page 29 the steamship company's attorney refers to comments made by Judge Oakes with respect to the instant case. Judge Oakes improvidently contradicted himself in discussing this case. In *Royal Typewriter v. Kulmerland,* 483 F. 2d 648, note 8, Judge Oakes stated: "we do not, of course, pass upon *Rosenbruch* now on appeal." It is surprising therefore that Judge Oakes should reverse himself and proceed to discuss *Rosenbruch* in *Cameco v. SS American Legion.* Clearly, Judge Oakes did not have the record on appeal or the briefs of the parties, therefore, it was improvident for him to discuss the case despite the fact that he had actual notice that an appeal was pending.

On page 31 the steamship company repeats the specious claim that they do not know what they are receiving when sealed containers are received. This is a false argument inasmuch as COGSA does not condition its limitation on this information, and the carrier drafted its bill of lading forms so as to not permit the shipper to specify particulars with respect to containerized goods. Moreover, it failed to take advantage of its own tariff privilege of inspecting containers for contents. This is another

instance of lawyers' rhetoric which is refuted by their own assertion that the particulars shown on a bill of lading has no legal effect whatsoever and can be deleted by the steamship company. (See Rosenbruch's main brief, p. 10, for citations.)

At page 35 of the steamship company's brief, it alludes to the Customs Convention referred to in the Rosenbruch brief. Rosenbruch does not purport to argue that the definitions of a container provided in the Safety Convention and Customs Convention are binding on this court. The sole purpose of referring this court to the definitions contained in the two Conventions is to illustrate the universal understanding of the term "container" by knowledgeable people in foreign commerce that a container is *"transport equipment"* and not packaging. In addition, the definitions in the two Conventions provide further insight into the true make-up and functions of containers.

On pages 36 and 37, the steamship company reaches way back into the year 1870 to refer to a railroad case decided in England, entitled *"Whaite v. The Lancashire and Yorkshire Railway Company."* It is unseemly to refer this court to an ancient decision in a foreign jurisdiction with respect to matters that are completely irrelevant to modern containers and containership operations, as well as the Carriage of Goods by Sea Act of 1936. There is a *relevant* English decision which was handed down in 1938 with respect to the Carriage of Goods by Sea Act which indicates quite clearly that the 1870 decision is contrary to the philosophy of the Carriage of Goods by Sea Act. See *Studebaker Distributors v. Charlton Steamshipping Company* (1938), 1 KB 459, 467. Further, if one is to desperately reach for package cases, one could refer this court to *Southern Express Company v. Crook*, 44 Ala. 468. In that case an appellate court in the State of Alabama held that a bale of cotton and a

hogshead of tobacco are not packages with respect to a limitation of liability of $50 per package for the reason that "packages as here must be interpreted to mean *smaller parcels or bundles* * * *." (Italics added.)

On page 45 the steamship company's attorney referred to a law review article entitled "The Operational Realities of Containerization, etc." Bissell, 45 Tulane Law Review 902 (1971). This law review article was written by Mr. Bissell while he was a partner in the same firm of attorneys that represents the defendant-appellee in the instant case. It is significant to read what an attorney who represented American Export Lines wrote at that time with respect to containers and the package question. Referring to the *Leathers Best* decision at the time it was handed down by the lower court, Mr. Bissell, on page 914, wrote as follows:

> "Therefore, the court had to decide that either the carton or the container was a package for limitation purposes. It seems logical that the court should hold that the carton rather than the container was the package, since only by so holding could the court protect the shipper's right to present valid claims, and at the same time limit excessive claims in respect to small packages of great value."

In Reply to the Deviation Issue—Point II of the Steamship Company's Brief.

Where a deviation occurs, the burden of proof is on the steamship company to establish that it was reasonable in accordance with the Carriage of Goods by Sea Act, 46 U. S. C. Sec. 1304(4). Despite the fact that Rosenbruch in his main brief (at p. 26) points out the *prima facie* statutory unreasonableness of the ondeck stowage, no valid attempt was made to refute this state-

ment. No relevant facts whatsoever were adduced by the steamship company in either of its papers below. The fact that a steamship company intended to stow Rosenbruch's shipment on the weather deck of the ship does not prevent such intentional stowage from being a deviation. In fact, one of the elements of a deviation is an intentional act by the steamship company. The test is not the intent of the carrier but whether the weather deck is as safe a stowage place as below decks. From the loss of or damage to thirty-two containers on deck it is obvious that the stowage—no matter how arranged—on the weather deck of the ship did not protect the containers that were stowed thereon from the damages caused by the seas, which were normal for a winter crossing of the North Atlantic ocean.

On pages 43 and 44 the steamship company's attorney quotes Judge Tyler as finding that Santini Bros. accepted the bill of lading as altered by the steamship company; however, there is nothing in the record to indicate *when* the signed and altered bill of lading was returned by the steamship company to Rosenbruch's agent. Obviously, if the ship had already sailed prior to the receipt of the altered bill of lading, any protest would be an empty gesture since the ship would not be brought back and restowed at Santini's request. Since containerships can load their containers in a matter of hours, in all likelihood, the ship already left port before the altered bill of lading was received back, so that nothing could have been done to change the stowage of Rosenbruch's container. Manifestly, the steamship company would have refused such a request, since the steamship company takes the position that by reason of its tariffs (which its own cartel or conference drafts) there is no way that a shipper could provide for stowage of his shipment underdeck when it is containerized.

CONCLUSION.

The lower court's summary judgment limiting the steamship company's liability to $500 should be reversed and judgment entered for $35,000 as stipulated by the parties.

Respectfully submitted,

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Services of three (3) copies of
the within Brief. is
hereby admitted this 20 day
of August, , 1975
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